UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 44-326

HUDSON TRANSIT LINES, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ADIRONDACK TRANSIT LINES, INC., DEFENDANT-INTERVENOR

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant-appellants, United States and Interstate Commerce Commission, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment and decree of the District Court entered in this cause on February 28, 1949. A petition for appeal was filed on April 22, 1949, and is presented to the district court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the decision in this cause is conferred by the Judicial Code as revised by the Act of June 25, 1948, effective September 1, 1948, Title 28, U. S. Code, Sections 1253 and 2101(b), consolidating the provisions of Sections 47 and 47a of Title 28, U. S. C., 1940 Ed., relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission. The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment or direct appeal in this case. *United States* v. *Pierce Auto Lines,* 327 U. S. 515; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60; *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U. S. 236; *Alton R. Co.* v. *United States,* 315 U. S. 15.

STATUTE INVOLVED

Section 207(a) of the Interstate Commerce Act, as amended, 49 Stat. 551, 49 U. S. C. 307(a), relating to issuance of certificates of public convenience and necessity to common carriers by motor vehicle, provides in part:

> Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied:
> * * *

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THE ISSUES AND THE RULING BELOW

The district court's decree of February 28, 1949, set aside, in part, an order of the Interstate Commerce Commission, dated July 8, 1947, in Docket No. MC-2835 (Sub-No. 10), *Adirondack Transit Lines, Inc.—Extension—Lincoln Tunnel.*

The Commission's order, upon proof of public convenience and necessity under Section 207 of the Interstate Commerce Act,[1] authorized the intervener, Adirondack Transit Lines, Inc., to operate its busses into New York City through the newly-constructed Lincoln Tunnel instead of via the Weehawken ferry as theretofore.

The Commission found that use of the Tunnel route instead of the ferry would serve public convenience and necessity. A condition was imposed, however, for the protection of urban mass transportation operators in the vicinity of New York City. Adirondack was prohibited from handling local traffic between New York City and Paramus, New Jersey, a point about 17 miles from New York.[2]

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[1] Adirondack's claim that, without additional authorization, it was entitled to use the Tunnel by virtue of its "grandfather" route via the ferry, was rejected in *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503 (S.D.N.Y., 1944), aff'd 324 U.S. 824. It then obtained temporary authority to use the Tunnel route, and filed the application for permanent authority involved in the case at bar. Thus Adirondack has in fact operated via the Tunnel ever since it was opened.

[2] On July 3, 1946, Division 5 of the Commission issued its report and order wherein it granted the application subject to the condition that operation be restricted to the transportation of traffic moving between New York City and points north of Monroe, N. Y., a point 46 miles distant from New York City. Thereafter on petition of the applicant the Commission reopened the proceeding and on July 8, 1947, Division 5, on the existing record, modified the report and order of July 3, 1946, so as to fix the northerly restrictive point at Paramus, N. J., a point about 17 miles from New York City. Reconsideration of this order was denied by the Commission as a whole on October 13, 1947.

Hudson Transit Lines, Inc., plaintiff in the instant action, was a protestant before the Commission, and sought a restriction upon Adirondack's operation so as to exclude service at all points south of Monroe, New York, where the routes of Hudson and Adirondack join. From there to New York City the routes of Hudson and Adirondack are parallel. North of Monroe Adirondack's routes extend to Kingston, thence to Oneonta, Saranac Lake, and Ticonderoga. North of Monroe Hudson's routes extend to Binghamton and Kingston, New York, and Forest City, Pennsylvania. Adirondack's principal operation is between New York City and Kingston, a distance of approximately 100 miles, and in such service it has long transported, via the ferry route, passengers between New York City and points south of Monroe.

Hudson's interest as protestant lay in protecting its so-called short haul service between Middletown, New York and New York City and between Newburgh, New York, and New York City, both of which routes pass through Monroe. The Commission found that the urban mass-transportation area in the vicinity of New York City extends no further north on the routes involved than to Paramus, New Jersey, the point designated in the condition imposed by the Commission. Busses serving points in the less densely populated area between Paramus and Monroe, the Commission found, operate upon schedules published in printed time-tables and the passengers purchase tickets before boarding the vehicles. In other words, the Commission found that north of Paramus the service furnished was typical of long-distance over-the-road service, of the sort in which Hudson and Adirondack had long been engaged, in competition with each other; and

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that no restriction for the protection of urban mass-transportation operators would be appropriate.

Hence the Commission concluded that to impose the restriction sought by Hudson would result in loss of revenue to Adirondack at points it has served for many years; would result in wasteful transportation and inconvenience to the public; and would also give Hudson a virtual monopoly between New York City and points south of Monroe.

After the Commission made its order of July 8, 1947, Hudson filed suit to set aside so much thereof as authorized Adirondack to engage in passenger transportation between New York City and points in New Jersey and New York on its authorized route between Paramus, New Jersey, on the south and Monroe, New York, on the north. The case was heard by a duly constituted three-judge court, and the record before the Commission was introduced into evidence. On April 15, 1948, the court filed its opinion wherein it adopted the report and order of July 3, 1946, by Division 5, which had been replaced by the later order of July 8, 1947, but without sufficient justification in the court's view to warrant the Commission in changing its mind. Final decree was entered on February 28, 1949.[3]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The judgment of the court below rests upon an erroneous interpretation and application of the

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[3] The decree set aside the order of the Commission to the extent that it authorized Adirondack to transport passengers in short haul service between New York City and points in New Jersey and New York south of Monroe, N. Y., but permitted the Commission to authorize Adirondack to transport passengers between such points in connection with operations between Kingston, New York, and points north thereof and New York City.

standard of public convenience and necessity in cases arising under Section 207 of the Interstate Commerce Act. The standards established by that section have been construed by the courts in numerous cases as conferring upon the Commission the task of deciding what transportation service will best serve the public interest. Both the kind and quantity of such service are to be determined by the Commission in the exercise of its expert judgment. The Commission is vested with a wide range of administrative discretion; no particular factors are specified by the statute as controlling; in particular it is not necessary that the Commission make a finding with respect to the inadequacy of existing carriers or their inability to expand or improve their service so as to handle all available business. On the contrary, the power to authorize additional service is one of the weapons in the Commission's arsenal; indeed, such new service may be established for the very purpose of creating competitive conditions and affording to the public the benefit of the stimulus thus provided. Leading cases in support of the accepted construction of Section 207 include *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515; *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U. S. 236; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60; *Chesapeake & Ohio Ry. Co.* v. *United States,* 283 U. S. 35; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215 (E. D. Pa., 1942), aff'd 317 U. S. 587; *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N. D. Calif., S. D., 1944), aff'd 323 U. S. 668; *Carolina Scenic Coach Lines* v. *United States,* 56 F. Supp. 801 (W. D. N. C., 1944), aff'd 323 U. S. 678; *Crichton* v. *United States,* 56 F. Supp. 876 (S. D. N. Y.,

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1944), aff'd 323 U. S. 684; *A. B. & C. Motor Transp. Co.* v. *United States,* 69 F. Supp. 166 (D. Mass., 1946); *Lang Transp. Corp.* v. *United States,* 75 F. Supp. 915 (S. D. Calif., Cent. Div., 1948); *Beard-Laney, Inc.* v. *United States,* (E. D. S. C., decided February 7, 1949).

In contradiction to the established interpretation of Section 207 the district court adopted a contrary doctrine holding that the Commission must make a finding that existing facilities are inadequate before it may find that a proposed motor carrier service is required by public convenience and necessity.

The only authority cited by the district court in support of its holding is *Inland Motor Freight* v. *United States,* 60 F. Supp. 520 (E. D. Wash., 1945). Indeed, that is the only case discoverable in which a court has ever set aside an order of the Interstate Commerce Commission with respect to the amount or character of transportation service required by public convenience and necessity. The authority of that case has never been recognized in subsequent decisions, and was thought to have been thoroughly discredited until revived by the district court's decision here.[4]

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[4] The *Inland* case has been rejected in every subsequent case where it has been cited by counsel: *A. B. & C. Motor Transp. Co.* v. *United States,* 69 F. Supp. 166, 170 (D. Mass., 1946); *Dohrn Transfer Co.* v. *United States,* (N.D. Ill. E.D., Civ. No. 46C 1134, decided January 21, 1947, unreported); *Lang Transp. Corp.* v. *United States,* 75 F. Supp. 915 (S.D. Calif., Cent. Div., 1948); *Beard-Laney, Inc.* v. *United States,* (E.D.S.C., decided February 7, 1949, not yet reported). No appeal was taken in the *Inland* case, for the reason that the same issue was involved in two cases then pending (*Pierce* and *D. & C. Navigation Co., supra*) where reversals were obtained and the Commission's orders sustained in accordance with the line of authorities disregarded by the *Inland* opinion and that in the case at bar.

A very recent opinion by Circuit Judge Parker [5] contains the following comment on the *Inland* case:

> We have considered what was said by Judge Schwellenbach in the case of Inland Motor Freight v. United States, 60 F. Supp. 520, but, with all respect, we are not persuaded of the correctness of the view there indicated. On the contrary, we think that for the courts to enforce any such rule in reviewing orders of the Commission is for them to misconceive their function. It is for the Commission, not the court, to say what public convenience and necessity requires and whether these will be better served by licensing an additional carrier than by permitting those already licensed to expand their facilities.

The resuscitation of the *Inland* case by the district court's decision here creates a conflict harmful to the proper administration of Section 207. Elimination of such conflict by appropriate exercise of appellate jurisdiction in the case at bar will remove doubts and uncertainty flowing from the district court's decision and discourage court attacks upon orders of the Commission in like cases.

Moreover the instant case is an important one since the district court has adopted a novel approach in testing the validity of the Commission's order. It has not applied to the report and order the orthodox tests of validity. The district court first notes that in a prior report based upon the

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[5] *Beard-Laney, Inc.* v *United States* (E.D.S.C., decided March 10, 1949, not yet reported). A comprehensive and detailed discussion of the authorities is also to be found in the *Lang* case, 75 F. Supp. 915. The same point urged by the protestant in the instant case was rejected in the *Davidson* and *Crichton* cases, *supra*. S. Ct. Records and Briefs, Vol. 26, October Term, 1942, Case 113, Appellants' Statement of Jurisdiction and Questions Involved at p. 4; Vol. 201, October Term, 1944, Case 732, Appellant's Statement as to Jurisdiction at p. 4.

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same record the Commission found that operation over the approved route should be limited to the transportation of traffic moving to or from points in New York north of Monroe. The findings of that report, the district court holds, "are supported by the evidence and fully justified the limitation imposed by the order of July 3, 1946." Having thus upheld the validity of an order which was not in issue in the case, the district court proceeds upon the erroneous assumption that, upon the same record, the Commission is precluded thereby from arriving at any different conclusion without stating "clear reasons for such reversal." [6]

The opinion then proceeds to evaluate the basic findings of the Commission and holds them insufficient in law to justify the reversal of the order of July 3, 1946. In so doing the district court weighed the evidence with respect to traffic density within the disputed area and the average passengers per trip carried by Adirondack between New York City and points in the segment and concludes that such evidence "can hardly be considered substantial enough to evidence a real need." Aside from plainly usurping the administrative function of the Commission the district court ignored other factors weighed by the Commission in the scale of public convenience and necessity and overlooked the fact that evidence which might not demonstrate

[6] This mode of reasoning is contrary to the fundamental principle that judicial review deals only with the final action of the administrative agency. Prior tentative views, examiner's reports, and similar preliminary expressions of opinion which are later superseded upon more mature consideration by the agency do not constitute the official action of the Commission and are in no respect binding upon the reviewing court or supported by any presumption of validity or authoritativeness. *B. & O. Railroad* v. *United States*, 298 U.S. 349, 370-1; *Federal Radio Commission* v. *Nelson Bros.*, 289 U.S. 266, 285-6.

public need for an entirely new operation may well justify authority to engage in additional service incidental to a larger operation already authorized.

Finally it is clear from the wording of the decree entered in this case that the district court has undertaken to act as a regulatory agency in the field of bus transportation, has substituted its judgment for that of the Commission on the question of public convenience and necessity, and has disregarded the principle that courts are not the "arbiters of the paramount public interest." *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 535. The decree in effect amounts to a certificate of public convenience and necessity prescribing what transportation service may be rendered. It requires the Commission to restrict Adirondack's service within the segment in question and defines the limits of such restriction. Service may be authorized within the disputed area, under the decree, if the busses furnishing it proceed from or to more distant points beyond that area.

It is thus evident that important issues involving the interpretation and administration of the Interstate Commerce Act have been erroneously decided by the district court and are raised in this appeal. It is accordingly submitted that substantial questions are involved which call for the appropriate exercise of appellate jurisdiction.

Date April 22, 1949.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 44-326

HUDSON TRANSIT LINES, INC., PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

ADIRONDACK TRANSIT LINES, INC., DEFENDANT-INTERVENOR.

Action by Hudson Transit Lines, Inc., against the United States and the Interstate Commerce Commission to set aside orders of the Commission, wherein Adirondack Transit Lines, Inc., was granted leave to intervene.

James F. X. O'Brien, Esq., of Newark, N. J., for plaintiff.
Daniel H. Kunkel, Esq., of Washington, D. C., for Interstate Commerce Commission.
Edward Dumbauld, Esq., of Washington, D. C., for United States.
Martin J. Kelly, Jr., Esq., of New York, N.Y., for intervenor-defendant.

Before Swan, Circuit Judge, and Rifkind and Ryan, District Judges

SWAN, C. J.:

This is a suit to set aside an order of the Interstate Commerce Commission dated July 8, 1947, which authorizes the issuance of a certificate of public convenience and necessity to Adirondack Transit Lines, Inc. Adirondack is a motor carrier engaged in the transportation of passengers by motor bus over authorized routes between New York City and points in northern and central New York. The plaintiff, Hudson Transit Lines, is also a motor carrier engaged in the transportation of passengers by motor bus over authorized

routes. From Paramus, N.J. to Monroe, N.Y., Hudson operates over the same route as does Adirondack. As a competitor it has an interest which gives it standing to bring this suit. Alton R. Co. *v.* United States, 315 U. S. 15, 19.

The suit is brought pursuant to 28 U.S.C.A. §§ 41 (28), and 43 to 48 and 49 U.S.C.A. § 305 (g). The court has jurisdiction. Pursuant to 28 U.S. C.A. § 45a Adirondack was properly allowed to intervene as a defendant.

The Commission's order of July 8, 1947 which the suit seeks to set aside, was entered in a proceeding by which Adirondack sought under 49 U.S.C.A. § 307 an extension of its route between Weehawken, N.J. and New York City that would permit it to use the Lincoln Tunnel and to abandon operations via the West Shore-42nd Street Ferry. The order grants such permission but imposes a restriction on Adirondack's operations via the Tunnel, limiting it to transportation of passengers moving between New York City and points north of Paramus, N.J. This is a modification of an earlier order, dated July 3, 1946, in the same proceeding which restricted Adirondack to the transportation of traffic moving between New York City and points north of Monroe, N.Y. The later order was made upon the same record as the earlier, without any additional evidence, and Hudson contends that the Commission's removal of the restriction from Monroe to Paramus is (a) unsupported by necessary basic findings, (b) unsupported by substantial evidence, and (c) unlawfully discriminatory. By its brief, however, Hudson concedes that it will be satisfied if the northern limit of the restriction is set as the intersection of New York Highways 17 and 32 at Harriman, N.Y., which is a few miles south of Monroe.

The history of Adirondack's operations antedating the proceeding in which the order under attack was issued may be summarized as follows: On June 4, 1937 Adirondack received a "grandfather" certificate, pursuant to 49 U.S.C.A. § 306, for its operations over described routes which led from

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New York City to Weehawken, N.J. and thence to Kingston, Saugerties, Saranac Lake and Massena, N.Y. Until the opening of the Lincoln Tunnel in December 1937 Adirondack used the ferry from Weehawken to cross the Hudson River. After the Tunnel was opened it used the Tunnel in the belief that its grandfather certificate authorized such use. In Lincoln Tunnel Applications, 12 M.C.C. 184, 196, the Commission ruled that use of the Tunnel was such a change in operations as to require a certificate of public convenience and necessity. Following this ruling, the Commission held that Adirondack's use of the Tunnel was unlawful; and its decision was sustained in Adirondack Transit Lines *v.* United States, 59 F. Supp. 503, aff'd 324 U. S. 824. Thereafter Adirondack continued its use of the Tunnel under temporary authority granted by the Commission. Thus since the opening of the Tunnel Adirondack has not operated by way of the Ferry.

On July 13, 1944, Adirondack initiated the proceeding here involved by filing an application for a certificate of public convenience and necessity, in order to obtain permission to substitute the Tunnel route for the Ferry route. After a hearing the Examiner recommended issuance to Adirondack of a certificate restricted to the carriage of traffic destined to or from points north of the New York-New Jersey state line, which is 31 miles from the city of New York. Both Adirondack and various protestants including Hudson filed exceptions as to the nature and extent of the restriction. The Examiner's recommendation was modified by the Commission, Division 5, which by order of July 3, 1946, set the restriction at Monroe, N.Y., a point 46 miles from the city. The Commission as a whole approved this decision on January 6, 1947, by denying Adirondack's petition for reconsideration. Thereafter, upon a second petition for reconsideration, the Commission on April 7, 1947, reopened the proceeeding and sent it back to Division 5 to determine upon the existing record whether and to what extent the restriction upon Adirondack's serv-

ice should be modified. On July 8, 1947, Division 5 issued its report and order modifying its former order of July 3, 1946, so as to set the northerly restrictive point at Paramus, N.J. instead of Monroe, N.Y. This point is approximately 17 miles from New York City. The protestant Hudson moved for reconsideration and further hearing, but this was denied by the Commission by order dated October 13, 1947.

Hudson's suit seeks to set aside both the order of July 8th and the order of October 13th, which in effect affirmed the July 8th order. Its complaint is directed against only that part of the order of July 8th which authorizes Adirondack to engage in passenger transportation between New York City and points in New Jersey and New York on its authorized route between Paramus, N. J. on the south and Monroe, N. Y. on the north. Over this segment of the route Adirondack's service is competitive with Hudson's shorthaul and commuter service. While the competition will not be serious so long as Adirondack continues, as it has in the past, to accept passengers to or from points within this segment only when there are vacant seats in its long-haul busses, Hudson fears that under the certificate authorized by the order of July 8th Adirondack will inaugurate a short-haul and commuter service that will destroy the value of Hudson's same type of service which has been built up at large expense during the last ten years and has only recently become profitable.

The plaintiff does not question so much of the order of July 8, 1947, as will permit Adirondack to route its long-haul busses through the Lincoln Tunnel. But the order will also enable Adirondack to inaugurate a short-haul and commuter service via the tunnel between New York City, on the one hand, and, on the other hand, points intermediate between and inclusive of Monroe, N. Y. and Para-

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mus, N. J. This will be a new service. The issue for our decision is whether the Commission's ultimate finding that the public convenience and necessity require such service is supported by adequate subordinate findings and by substantial evidence. See Florida *v.* United States, 282 U. S. 194, 215; United States *v.* Carolina Carriers Corp., 315 U. S. 475, 488-9; United States *v.* Pierce Auto Lines, 327 U. S. 515, 533; Inland Motor Freight *v.* United States, 60 F. Supp. 520, 524-5 (E.D. Wash.).

The case is unusual in that upon the same record the Commission has reached two contradictory conclusions. Its report and order of July 3, 1946 found that public convenience and necessity did not require such service, since it set the northern limit of the restricted segment at Monroe. The report notes that Adirondack, although operating through the tunnel since December 1937, has catered chiefly to passengers requiring long-haul operations between New York City and authorized northern and mid-New York points; that on the basis of 4,039 trips during April, July, October and December 1944, Adirondack averaged less than 1.5 passengers per trip between Monroe and Weehawken including intermediate points, on the one hand, and New York City on the other. It says that "No public witnesses testified nor has any inadequacy of service by protestants between the foregoing points via the Tunnel been established," and "considering the evidence as a whole," the Commission states its opinion that the application should be granted, "subject to the restriction that operation over the proposed route shall be limited to the transportation of traffic moving to or from points in New York north of Monroe on applicant's presently authorized routes." The above findings are supported by the evidence and fully justified the limitation imposed by the order of July 3, 1946.

Without changing the subordinate basic findings which support the ultimate finding of lack of public convenience and necessity for unrestricted operation by Adirondack south of Monroe, the report and order of July 8, 1947 reverses that conclusion and substitutes the ultimate finding that unrestricted operation is required on so much of the route as lies south of Monroe and north of Paramus.

No clear reasons for such reversal are stated in the July 8th report. After referring to the earlier report and to the order of April 7, 1947 reopening the proceeding for reconsideration on the record as made, the report recites that "Facts set forth in the prior report will be restated only to the extent necessary to the disposal of the issue here presented." It then states what Adirondack "contends", namely, that the restrictive condition of the 1946 order is too severe, is unwarranted by the evidence, and will result in the loss of substantial revenue to it at points it has served for many years; but the report makes no direct finding as to the merit of such contentions. It next notes that Adirondack urges that the segment of its route between Paramus and Monroe is beyond the highly competitive, so-called "mass transportation", area and is rather sparsely settled, and it finds that the evidence supports this contention. What inference the Commission draws from this finding the report does not state. The natural inference would seem to be that there was a greater need for Adirondack's short-haul service south of Paramus than north of it; yet the restriction is lifted only as to the segment of the route north of Paramus. The report then finds that Hudson would be the only bus operator providing substantial service between New York City and the points on the described segment throughout the greater portion of the year; but it makes no finding that Hudson's service would be inadequate, nor does it allude to the finding of the earlier report that no inadequacy of service had been established. It does not even suggest that an operation

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competitive with Hudson's would secure better service for the public.

The closest approach to stating reasons for the modification of the restriction is contained in the following paragraph of the report:

> "Although applicant's routes are rather extensive, the largest number of its bus trips have been and are between New York City and Kingston, N. Y., a distance of approximately 100 miles. Applicant operates from and to the same terminal in New York City as does Hudson Transit. To require applicant to operate approximately 50 miles, one-half of the distance covered by the majority of its trips, without providing transportation to the public from and to New York City not only would appear unwarranted and arbitrary but would result in wasteful transportation and inconvenience to the public. When applicant's busses are leaving the New York City terminal, for example, prospective travelers to points on the restricted segment would be required to wait for the later departure of protestant's busses traveling over substantially the same routes, and the same inconvenience would be suffered in the opposite direction from points on such segment to New York City. We think that the inconvenience to the public of the present restriction far outweighs any possible detrimental effect upon protestant which the modification sought by applicant might have. Such effect in any event should not be severe. Applicant has long transported passengers between New York City and many of the points south of Monroe. The modification sought by applicant would permit continuance of such service, increase travel facilities for the public, and, in our opinion, would permit more efficient operation which also would result in benefit to the public. While Hudson Transit fears that the sought modification would deprive it of substantial

traffic and revenue, its fears are conjectural and unsupported by the evidence."

As noted in the earlier report, Adirondack carried on its long-haul busses an average of only 1.5 passengers per trip to and from the disputed segment of the route. Indeed, since Hudson is willing to have the northern point of the restricted segment fixed at Harriman, it argues that the passengers bound to and from Monroe should be excluded from the computation, and this would reduce the average per trip to less than one passenger. Hence the inconvenience to the public of having to wait for a Hudson bus can scarcely be thought substantial enough to establish a public need for additional service. Nor would it seem "wasteful transportation" for Adirondack's long-haul busses to operate through the restricted area with only 1.5, or less than one if the restriction stops at Harriman, vacant seats per trip. If it appears to the Commission "unwarranted and arbitrary" to prevent Adirondack from operating in the disputed segment in the same manner as it has heretofore operated, this could be accomplished by so wording the restriction as to permit the carriage of passengers to and from the disputed segment on long-haul busses, that is, busses destined from New York to Kingston or points north thereof and busses destined to New York originating at Kingston or points north thereof. This is all Adirondack's previous practice has been. But the new certificate will permit it to inaugurate short-haul and commuter operations without any finding of public need for such service or any inadequacy in existing facilities. And the statement that Hudson's fears are conjectural and unsupported by the evidence is not sustainable. The evidence shows without contradiction that if such service should be inaugurated in competition with Hudson's service of that type, neither carrier would find it profitable.

The Commission has frequently held that under §207 of the Act, 49 U. S. C. A. §307, there must be an affirmative showing not only that a common car-

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rier service is required in the convenience of the public but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. Pan-American Bus Lines, Operation, 1 M. C. C. 190, 203; Bluenose Bus Co. Ltd., Common Carrier Application, 1 M. C. C. 173, 176; Richard L. Richards, Extension of Operations, 6 M. C. C. 80, 81; Ohio Transportation Co., Common Carrier Application, 29 M. C. C. 513, 520; Royal Cadillac Service, Inc., Common Carrier Application, 43 M. C. C. 247, 259. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public "necessity". Inland Motor Freight *v.* United States, 60 F. Supp. 520, 524 (E. D. Wash.). See also I. C. C. *v.* Parker, 326 U. S. 60, 69-70 and dissenting opinion of Mr. Justice Douglas at p. 74. This does not mean that the holder of a certificate is entitled to immunity from competition under any and all circumstances. Chesapeake & O. Ry. Co. *v.* United States, 283 U. S. 35. The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. I. C. C. *v.* Parker, supra. No such finding has here been made, nor is there any evidence to support such a finding.

It is true that evidence of past operations under color of right may be taken into consideration in determining the present or future public convenience and necessity. Crichton *v.* United States, 56 F. Supp. 876, 879 (S. D. N. Y.), aff'd, 323 U. S. 684; Inland Motor Freight *v.* United States, supra, 525. But as noted above the carriage by Adirondack of an average of 1.5 passengers per trip between the disputed segment and New York City (¾ of a passenger if Hudson's concession to Harriman is considered) can hardly be considered to be substantial enough to evidence a real need. "Substantial, as distinguished from incidental, sporadic, or infrequent service is required." United States *v.* Carolina Freight Carriers Corp., 315 U. S. 475, 480-1.

So much of the order of July 8, 1947 as authorizes Adirondack to inaugurate short-haul and commuter operations south of Monroe and north of Paramus is not based on any finding that the existing service is inadequate, or that the newly authorized operation will secure to the public improved service, and conflicts with the findings in the Commission's report of July 3, 1946 that no inadequacy has been established. Therefore this portion of the order must be set aside and the cause remanded to the Commission for such action as it may deem appropriate and in accordance with this opinion. It is so ordered. We adopt as our findings of fact the findings of the Commission, Division 5, in its report and order of July 3, 1946. Our conclusions of law are stated in the foregoing opinion. Settle order on notice.

Dated: April 15, 1948.

(Sgd.) THOMAS W. SWAN,
(Sgd.) SIMON H. RIFKIND,
(Sgd.) SYLVESTER J. RYAN.

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

and

ADIRONDACK TRANSIT LINES, INC., DEFENDANT-INTERVENOR

DECREE

This cause having been heard on final hearing and upon arguments and briefs of counsel for all

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parties to the proceeding, and the same having been heard and considered, and the Court having filed its opinion, findings of fact and conclusions of law, in which the Court adopted as its findings of fact the findings of the Commission, Division 5, in its report and order of July 3, 1946, in the proceeding before the Commission here reviewed, and in which the Court found that the order of the Commission in said proceeding of July 8, 1947, was unsupported by substantial evidence, and was unsupported by necessary basic findings, to the extent that it modified and reversed the prior order of July 3, 1946 in said proceedings,

It is, thereupon, ORDERED, ADJUDGED AND DECREED that so much of the order of the Interstate Commerce Commission made July 8, 1947 in Docket No. MC 2835, Sub. No. 10, Application, Adirondack Transit Lines, Inc.—Extension—Lincoln Tunnel, and which was affirmed by subsequent order of the Interstate Commerce Commission dated October 13, 1947, as authorized Adirondack Transit Lines, Inc. to transport passengers in short haul service between New York City, New York, on the one hand, be, and the same is hereby annulled and set aside; provided that nothing herein shall be deemed to prevent the Interstate Commerce Commission from authorizing Adirondack Transit Lines, Inc. to transport passengers between New York City on the one hand, and points on its authorized route in New Jersey and New York, between a point 2,000 feet north of the intersection of New Jersey Highways 17 and 4 at Paramus, New Jersey, and the south village line of Monroe, New York, on the other, on buses which are destined from New York City, and which operate through to Kingston, New York, or points north thereof, and on buses destined to New York City, and which operate through to New York City from originating points at Kingston, New York, or points north thereof, and

It is further ORDERED that the proceedings herein be remanded to the Interstate Commerce Commission for such action as may be proper, and in ac-

cordance with the opinion and order of this Court filed herein.

Dated: February 28, 1949.

(S.) THOMAS W. SWAN,
United States Circuit Judge;
(S.) SIMON H. RIFKIND,
United States District Judge;
(S.) SYLVESTER J. RYAN,
United States District Judge.

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SUPREME COURT OF THE UNITED STATES
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 105

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

HUDSON TRANSIT LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND STATEMENT OPPOSING JURISDICTION

SAMUEL WEISS,
JAMES F. X. O'BRIEN,
Counsel for Appellee.

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants

MOTION TO AFFIRM

To Messrs. Herbert A. Bergson, Assistant Attorney General, and
Edward Dumbauld, Special Assistant to the Attorney General, Attorneys for the Defendant-Appellant, United States of America, and
To Messrs. Daniel W. Knowlton, Chief Counsel, and
Daniel H. Kunkel, Attorney for Defendant-Appellant, Interstate Commerce Commission.

SIRS:—

Please take notice that the plaintiff-appellee, Hudson Transit Lines, Inc., does, pursuant to Rule 12, Paragraph 3, and pursuant to Rule 7, Paragraph 4, move to affirm the order and decree of the District Court in the above entitled

cause upon the grounds that the questions involved in the appeal to the Supreme Court of the United States are so unsubstantial as not to need further argument, and that the Statement as to Jurisdiction filed by the appellants does not disclose any adequate statement of grounds indicating that the questions involved are substantial as required by Rule 12, Paragraph 1. In this motion, we shall rely upon the Statement Against Jurisdiction annexed hereto and filed herewith.

Dated: May 5th, 1949.

Yours very truly,

SAMUEL WEISS.

SAMUEL WEISS,
Attorney for Plaintiff-Appellee,
Hudson Transit Lines, Inc.,
535 Fifth Avenue,
Borough of Manhattan,
City of New York, N. Y.;

and

JAMES F. X. O'BRIEN,
Attorney for and of Counsel
with Plaintiff-Appellee,
Hudson Transit Lines, Inc.,
17 Academy Street,
Newark 2, New Jersey.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 44-326

HUDSON TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants

STATEMENT AGAINST JURISDICTION

Pursuant to Rule 12, Paragraph 3 of the Supreme Court Rules, Hudson Transit Lines, Inc., plaintiff-appellee herein, presents this Statement Against Jurisdiction, and respectfully submits that the questions involved in the instant appeal to the United States Supreme Court are so unsubstantial as not to need further argument.

Statement of Facts and Issue Involved

An appeal was taken by the defendant-appellant, Adirondack Transit Lines, Inc., in this cause, and the plaintiff-appellee, which makes the instant motion to affirm, filed a

motion to affirm and a statement against jurisdiction directed against the appeal filed by Adirondack Transit Lines, Inc. Much of the matter alleged in that motion and statement constitutes the basis for the instant motion to affirm and statement against jurisdiction. We do not wish to burden the Court with duplication of reading, and shall endeavor not to repeat in this statement against jurisdiction the bulk of that contained in the one previously filed by us in this cause, inasmuch as the Court will undoubtedly have occasion to read the previous motion and statement before coming to consideration of the instant one.

While the basic attack upon the opinion and decree of the Court below is the same in the instant appeal as in the Adirondack appeal, we feel constrained to answer certain errors and misconceptions in the assignment of errors and statement as to jurisdiction contained in the instant appeal and not in the Adirondack appeal.

To one familiar with the record and the determination of the Court below, the contents of the assignment of errors and statement as to jurisdiction would seem to refer to another case altogether. The Court below is charged with holding what it never held, and the real issues are so camouflaged as to be hardly recognized. The Court never took the position alleged in assignment of error No. 3, nor 4, nor 5, and in its interpretation of Section 207(a) of the Interstate Commerce Act, Part II, it merely repeated the interpretation constantly reiterated by the Interstate Commerce Commission itself in innumerable decisions from the time that Act was passed, up to and including the present time, and which had been the interpretation of the pertinent words in similar statutes, and in both Federal and State jurisdictions for many, many years past.

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Likewise, the allegation of error to the Court because it examined the only possible pertinent bit of evidence touching upon necessity and convenience, and found that it did not meet the standards of substantial evidence, is a twisting of what happened because the Court did not weigh conflicting evidence nor indeed, in the true sense, even weigh the evidence. The Court merely complied with its obligation to examine the evidence in the record to see if there was substantial evidence which could support a Commission finding of need. This is an obligation of the Court, and to that extent involved a mental process which might be considered a weighing or considering of the evidence, but only as the Court made clear to that limited extent, to wit, to determine whether there was substantial evidence in support of a finding. Errors 7 to 10 inclusive are included in the above.

The real crux of appellants' complaint appears in errors 11 and 12, one of which just objects to the decree at all without comment, and the other because the Court failed to permit the Commission to make an order which was not supported by substantial evidence, and indeed which was not supported by findings required by law. In essence, appellants take the position that there is not any such thing as an appeal to the Court because whatever the Commission does is justified by saying that it acted within its discretion. In this respect, appellants are merely repeating what they told the Court below, to wit, that the Commission is a law unto itself, and is not accountable to the Courts, and that the Courts in effect have no right to question any action of the Commission irrespective of the evidence, the record, or the findings, because the Commission has unlimited discretion. This contention is so utterly at variance with established law and the many determinations of this Court that to again review it would be to waste

the court's time, and the money and time of the litigants involved.

In the Statement as to Jurisdiction, appellants cite many cases as allegedly in support of their position. All of these cases were analyzed in the argument before the Court below with the exception of a few very recent rulings, more particularly—

Beard-Laney, Inc. v. *United States,* Eastern District, South Carolina, decided February 7, 1949.

A careful reading and analysis of these cases, as presented to the Court below, and as can be here found by reference thereto, shows they do not support the position taken by appellants. Appellants cannot quote a sentence or a paragraph from one case, and another from another, and tie them together in an endeavor to mean what the Court never intended them to mean. Excerpts can be very misleading, and they have been so presented by appellants in this case.

At Pages 2 and 3 of the statement, appellants point out that a finding of need was made in a portion of the territory Adirondack sought to serve in the final order of the Commission, which changed its prior order. It fails in this respect to point out that on the identical type of evidence, the Commission thus applied one standard to the carriers south of a certain intersection, and another standard of law to the carriers immediately north thereof, despite a record which showed similar conditions existing in both. This type of discrimination was rejected by this Court in *United States* v. *Carolina Freight Carriers Corp.* 315 U. S. 475, where the Court pointed out that there is no statutory warrant for applying to irregular carriers a different or stricter test than that applied to regular route carriers. By the same token, the same tests concerning proof of necessity and convenience apply to all carriers operating along a route or

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routes, and no artificial line of demarcation can be drawn to emasculate the statute as to an unfavored few.

It is claimed, Sheet 4, that the Commission found the urban mass transportation area in the vicinity of New York City extended no further north than Paramus, New Jersey. This is utterly contrary to the record proof, which has no support for such statement, and indeed the record before the Court below discloses that as to the identical route north of Paramus, and running to Harriman, here involved, the Commission in a decision involving the plaintiff-appellee held that this particular territory was in that area affected by the change to use of Lincoln Tunnel, and therefore in effect within the urban mass transportation area. The only record in the case utterly contradicts the alleged claimed finding which, indeed, is so vague and indefinite as not to constitute a finding in law. On the same page, it is alleged that the buses north of Paramus operated on printed time-tables, with passengers purchasing tickets in many instances before boarding the vehicles, but the record of the case indicates that these identical circumstances existed in the case of the carriers south of that intersection whom the Commission protected. The allegation that the service north of Paramus was found to be long distance, over-the-road service was, as to the authorized carriers and particularly Hudson Transit, directly contrary to the uncontradicted proof which in both exhibit form and testimony form showed without contradiction that plaintiff-appellee ran two types of service thereon, one a long distance over-the-road operation, similar to Adirondack, and the other, a distinct and separate short haul and commuter division, servicing the people in that area. Again, the finding of the Commission is not only unsupported by anything in the record, but utterly contrary to the clear record proof.

Even if the alleged findings had been supported by the evidence, they would not in law have justified the Commission in interpreting necessity and convenience differently as to one set of carriers in comparison to another. Necessity and convenience, while applied under different circumstances, basicly means the same thing, and the Commission cannot ignore the requirements enacted by Congress and discriminate between allegedly different types of operation. As above mentioned, the Supreme Court condemned this attempt in the *Carolina Freight Carriers* case, *supra.*

The allegation, in the middle of Page 4 of the Statement, that the Commission concluded that the imposition of the restriction north of Paramus to Harriman would result in wasteful transportation just has no basis either in the record or even in fact in this appeal. The Court below, by the terms of its order, bent over backwards to protect and help Adirondack, and did not prevent the Commission from authorizing Adirondack to carry passengers in the manner in which it previously had, to wit, incidentally in connection with its long haul, over-the-road service, as distinguished from the order which prevented the Commission from permitting Adirondack a wide open certificate, which would permit it to institute a new competitive service, for which there was no record proof of necessity and convenience, and which the uncontradicted proof showed would be utterly destructive to the service given by plaintiff-appellee and others to the traveling public.

At page 5 of the Statement by appellants, and under the title, *"The Questions Presented Are Substantial,"* an attempt is made to inject issues which are not now and never have been issues in this case.

It is claimed that the Court below made an erroneous interpretation of Section 207 of the Interstate Commerce Act, and in particular erroneously held that there had to be

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proof in the record and a finding by the Commission with respect to inadequacy of existing carriers *"or their inability to expand or improve their service so as to handle all available business."* Appellants apparently recognize that the Commission in every case where it enunciated an interpretation of Section 207 (a), and the Courts likewise held, that proof of public convenience and necessity under that section entailed proof of a public need unfulfilled by existing facilities, and which could be fulfilled by an applicant without endangering the continued existence and service of present facilities. In order to avoid the above interpretation, made repeatedly by the Commission right to date, appellants attempt to add a new pretended issue, to wit, by inferring that the Court below found that the Commission in determining that there was public convenience and necessity for a new application had to find not only that existing carriers were not adequately serving the public, but that they could not put themselves in a position where they could expand or improve their service to handle the available business. This is a fictitious issue, and an attempt on the part of appellants to charge the Court below with a finding that it never made, and which never appeared any place in this case up to this Statement just filed on this appeal.

It is fundamental that the Commission does not have to go into the question of whether or not existing carriers can fill the public need if they want to, and there is not one word in this entire record to justify any belief that such a contention was ever made in this case. To the contrary, the uncontradicted finding of the Interstate Commerce Commission is that existing facilities in this territory are adequately filling the public need.

No one has contended, and indeed the Court below made that clear in its opinion, that upon proper record proof the Commission could authorize an additional operation in order

to introduce competition which was shown to be in the public interest, and where the benefits of an improved service would result. The Court below commented upon that and said that it was clear that the Commission could do so in a proper case, and that the holder of a certificate is not entitled to immunity under any and all circumstances, but the Court, after a review of the record in this case, pointed out with reference to this contention:—

> "No such finding has been made here, nor is there any evidence to support such a finding."

The numerous cases cited in the Statement of appellants, at page 5, do not support the contention that the Court below erred. An analysis of those cases was made in the argument before the Court below, and what might otherwise have been misleading excerpts from some of them were shown upon an analysis of the entire opinion in each of those cases to be wholly consistent with the contentions made by plaintiff-appellee, and to be wholly consistent with what the Court determined in its opinion herein.

At the bottom of Sheet 5 above mentioned, there is cited the case of *Beard-Laney, Inc.* v. *United States*, (E.D. S. C.) (decided February 7, 1949), which of course was not mentioned in the argument before the Court below because there had not yet been any decision in that case. This case is reported in the April 1, 1949 advance sheet of Federal Carriers Reports, and bears the citation in this unofficial publication of *7 Federal Carriers cases, page 2061.* It is apparently from this case that appellants got the idea of raising the fictitious issue, to wit, that the Commission does not have to make a finding that existing facilities can not expand and improve their service in order to fill a need of the public, and then attempted to infer that such erroneous interpretation of the Act had been made by the Court

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below in this case. It is true that in the *Beard-Laney* case the statutory court criticizes the opinion of Judge Schwellenbach in the case of *Inland Motor Freight* v. *United States, 60 Federal Supplement 520*, and, apparently because Beard-Laney claimed that under that decision, the Commission had to give it a chance to expand and increase its facilities and take care of the public need instead of letting somebody else in the picture. The Court, in the *Beard-Laney* case, said:—

> "We are not impressed by the argument that, because it is not shown that protestants could not increase their facilities to take care of the need which would arise upon the withdrawal of WECA, there is no basis for granting a certificate to applicant."

We agree with that statement of the court, although we do not agree with the inference that Judge Schwellenbach similarly held in the *Inland Motor Freight* case.

In the *Beard-Laney* case, there were certain carriers having permanent authorized rights, and a carrier having special temporary rights which was withdrawing from the field. The record proof in the case, as clearly shown in the Court's decision, disclosed that the existing facilities permanently certificated did not have the equipment or facilities to fill all of the public need that existed, and which would continue to exist upon the cessation of the temporary authorized operation. Therefore, a situation was presented where there was a clear public need, unfulfilled by existing carriers, and which those carriers could not fulfill in the ordinary course of events. The Court, in the *Beard-Laney* case, was very careful to document its position with excerpts from the Commission's decision, such as—

> "No common carrier service is shown to be available to serve the entire territory in which a definite need

for service is established by shipper witnesses, nor is it shown that existing carriers can absorb the substantial tonnage transported by WECA in the territory involved."

Thus, it is clear that the Court in the *Beard-Laney* case recognized inadequacy of existing facilities to constitute one of the elements making up proof of public convenience and necessity, and supported its determination on that very basis, and found that the record proof in that case substantially supported the Commission's findings and determination. The briefs in the *Beard-Laney* case will indicate that the statutory Court decision in the instant case was considered in argument of counsel, but it was not even cited by the Court because the issues in the cases were entirely different.

There is no conflict in the determination of the statutory court in the instant case with that in the *Beard-Laney* case. The cases are two entirely different cases with totally different sets of facts and involving clearly distinct issues.

It is beyond understanding to us why the Commission's attorneys should question the interpretation of Section 207 (a) as made by Judge Swan in this case because it is the identical interpretation which the Commission has always made of that Section, and which it is still making in interpreting what necessity and convenience means. The very morning that we are dictating this Statement Against Jurisdiction, we received the April 26, 1949 advance sheet containing 7 Federal Carriers Cases, page 104, wherein is reported the Commission decision in the *Application of H. M. Florman, No. MC-F 3496*, and in that case, the very latest available to us of any Commission determination discussing what public convenience and necessity means, the Commission said:—

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"Need is not synonymous with convenience or benefits, but pre-supposes a requirement not already being adequately met."

We cannot conceive the desire of the attorneys for the Commission to tear down the great body of law made by the Commission interpreting Section 207 (a), and which was adopted from the decision of this Supreme Court, as shown by the Commission's determination in *Pan-American Bus Lines*, 1 M. C. C. 190. It would indeed be a catastrophe if the Commission were to try to destroy a sound and long established interpretation of Section 207 (a) just in order to achieve what is apparently a desired objective in the instant case.

In an endeavor to create an issue which this Court might think meritorious enough to consider, appellants, at Page 7 of their Statement, try to say that the Court below tested the validity not of the final order of the Commission, dated July 8, 1947, but rather the prior decision of July 3, 1946. Again, this is not in accord with the facts. An examination of the decision of the Commission, dated July 8, 1947, to which was annexed the order which caused us to complain to the statutory Court, will disclose that the decisions of the Commission dated July 3, 1946 and July 8, 1947 are one decision, with the latter adopting the prior decision except as certain facts were re-stated. Therefore, the order appealed from was based upon the two decisions, with the latter one amending or correcting certain of the facts, as is clearly disclosed in the third paragraph of the July 8, 1947 decision, which said:—

"Facts set forth in the prior report will be restated only to the extent necessary to the disposal of the issue here presented."

It should be noted in passing that there was never a reversal, or re-statement, or correction of the clear, basic finding made in the July 3, 1946 report that existing facilities were adequately serving the public in the territory in question, and therefore this, not having been re-stated, was adopted as part of the final decision upon which the erroneous Commission order was made.

In the argument below, and in the Court's decision, there was never a question but that the final determination of the Commission is the one which the Court must consider, irrespective or prior or intermediate different determinations. In this case, since the Commission itself had tied the two reports in so that in order to know what they did, it was necessary to read both, the Court of course had to do just that. Examination of the Court's decision will likewise indicate that instead of reciting its findings of fact at length, it merely adopted, in order to shorten its opinion, the factual findings of the Commission in its decision of July 3, 1946, because those findings were supported by substantial evidence, and it rejected the order and determination appealed from because that order did not have substantial evidence supporting it.

It is charged that the Court below evaluated the basic findings of the Commission in the light of the record proof, but that is what the Court has to do in order to determine whether there is substantial evidence in the record to support the findings questioned on appeal. This Court has said that substantial evidence is not a mere scintilla but means relevant proof that a reasonable mind could accept to support a conclusion. In order to apply the very test enunciated by the Supreme Court of the United States, the Court below had to examine the findings and the record evidence. It did not weigh evidence to determine whether in its judgment it proved or did not prove something. It

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did not weigh conflicting evidence. It merely examined the record.

When the entire record is analyzed, the sum total of all relevant evidence upon which a claim of public necessity and convenience could be made was that evidence indicating that, while Adirondack ran without lawful authorization, it carried between the territory in question and New York City an average of ¾ of one passenger per Adirondack trip, which constituted the equivalent of approximately ⅕ of one passenger per Hudson Transit trip, without, even including trips of either Mountain Transit, Inter-City, or Greyhound. This was not substantial as distinguished from incidental service, which the Supreme Court said was necessary in the case of *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, and it was not evidence which a reasonable mind could accept as adequate to support a finding that there was a public need unfulfilled by existing carriers. Plain common sense would brand that evidence as so unsubstantial as to hardly constitute a scintilla. The Court in so determining was not usurping the function of the Commission in weighing the balance of evidence. It was exercising its prerogative and doing its duty by determining that such evidence could not as a matter of law be deemed adequate to a reasonable mind to support the Commission's conclusion.

Finally, in an endeavor to make claim that there is a substantial issue to be argued in this case, appellants at Sheet 8 of their Statement claim that the Court below acted as if it were the regulatory agency and substituted its judgment for that of the Commission. The basis for this is that the Court signed the decree proposed by the appellants in this case, instead of the decree proposed by plaintiff-appellee. The difference was that in appellants' form of decree it was provided that, although the Commission's order was set

aside and annulled, nevertheless, nothing in the Court's order should be deemed to prevent the Commission, if it so desired, from authorizing Adirondack Transit Lines to carry passengers in the manner in which it had previously done, to wit, between New York and the territory in question incidental to and in connection with its long haul operations, which the uncontradicted proof showed went at least as far as Kingston, New York.

Appellants asked the Court in the decree to at least let Adirondack do what it had done before, and which was the only proof in the case upon which any authority might possibly be predicated in the event that the Commission wanted to so authorize operation. The Court did not substitute its judgment for anybody's judgment. It merely did not prevent the Commission from exercising its judgment in that respect if the Commission so desired. The apparent basis for the Court accepting appellants' form of decree was the incorporated testimony of Adirondack's witness Cassidy, who, in such incorporated testimony, had stated that existing facilities would not be hurt very much if Adirondack merely did what it had always done, to wit, carry a few passengers incidental to service which ran through from New York, at least to Kingston, but that existing facilities would be seriously affected if a certificate were issued which would permit Adirondack to institute short haul and commuter type service, which it had never operated. Thus, the Court went even further than it should have in giving the maximum possible benefit to Adirondack from the evidence of its past carriage by not precluding the Commission from allowing Adirondack to get a certificate which would permit it to continue as it had theretofore operated.

Plaintiff-appellee is the only one who has a right to complain of this because their prior carriage under unlawful operation was of such an unsubstantial, sporadic and inci-

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dental character as to afford no basis for any finding of any need, when tested by the substantial evidence rule, and particularly in view of the Commission's finding, which it never changed, to wit, that existing facilities were actually adequately filling the public need. The Court did not prescribe what the Commission should or should not allow Adirondack, but on the contrary found from uncontradicted record proof that there was no substantial evidence to justify the kind of an order which the Commission issued, and which found public convenience and necessity for a directly competitive short haul and commuter service, for which the record contained no justification in law.

It is strange indeed that appellants should use as justification for their appeal the entry of a decree which they urged the statutory Court to adopt, and which it did adopt over plaintiff's objections. The statutory Court below went not only as far as it possibly could go on the record, but even further, we believe, in its desire not to override anything that the Commission ordered where there was the slightest semblance of lawful support for that Commission action.

The issues attempted to be raised by all appellants in this case are not and have not really been issues in the proceeding at all, but are attempts to create issues to justify the appeal. The only real issue, when the whole thing be analyzed, is an insistence that the Commission has a right to act as it pleases in any case without its actions being tested by any legal yard-stick, to wit, the statute of Congress as it has been interpreted by the Commission itself and by the Courts. The justification for this position is that the Commission has discretion, and exercises that discretion in the light of its expert judgment. Discretion is not, however, a substitute for substantial evidence and may only be exercised where there is something upon which to exercise it, to wit, substantial evidence.

We therefore urge the affirmance of the decree of the Court below, by which this Court will again proclaim approval of the interpretation of the words "public convenience and necessity" as they have been long interpreted by both the Interstate Commerce Commission and the Courts, including this highest court of our land.

Respectfully submitted,

SAMUEL WEISS.

SAMUEL WEISS,
Attorney for Plaintiff-Appellee,
Hudson Transit Lines, Inc.
535 Fifth Avenue,
Borough of Manhattan,
City of New York, New York,
and
JAMES F. X. O'BRIEN,
Attorney for and of Counsel with
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Dated: May 5, 1949.

No. 104. ADIRONDACK TRANSIT LINES, INC. *v.* HUDSON TRANSIT LINES, INC.; and

No. 105. UNITED STATES ET AL. *v.* HUDSON TRANSIT LINES, INC. Appeals from the United States District Court for the Southern District of New York. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS dissent. *Martin J. Kelly, Jr.* for appellant in No. 104. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellants in No. 105. *Samuel Weiss* and *James F. X. O'Brien* for appellee. Reported below: 82 F. Supp. 153.

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